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No. 08-20

Supreme Court, U.S.
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In the Supreme Court of the United States

DEBRA SLONE, SONJA EBRON,

Petitioners,

v.

BONNIE MYERS, PATRICIA HEATHERINGTON, A&E REAL ESTATE SALES AND MGMT., INC., CSS SERVICES, INC., WILLIAM W. WEST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Should the Court decline to grant the Petition where the state court of last resort has neither decided an important federal question nor decided a federal question in a manner that conflicts with another state court of last resort or a United States Court of Appeals?

2.

Should the Court decline to grant the Petition where the state appellate courts have neither decided an important question of federal law that has not been, but should be settled by this Court, nor have they decided an important federal question in a manner that is in conflict with relevant decisions of this Court?

3.

Should the Court decline to grant the Petition where a claim is not properly before this Court?

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations, and there are no publicly held companies owning 10% or more of the stock of either Respondent A&E Real Estate Sales and Management, Inc. or Respondent CSS Services, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PART ONE

STATEMENT OF THE CASE

Petitioners Slone and Ebron failed to pay rent for their former residence. R.5, V2. Respondent CSS Services, Inc. filed a dispossessory affidavit against Petitioners listing Respondent A&E Real Estate Sales and Management as the plaintiff and erroneously stating in the preprinted body of the form that the premises were "... the property of said plaintiff." R.5, V2. Respondent A&E was in fact the agent of the owner of the rental property. Respondents have not been participants in false swearings in dispossessory actions filed in Clayton County, Georgia. Petitioners' factual summary to the contrary is a misstatement of fact. Moreover, contrary to Petitioners' argument, Georgia law allows an agent to pursue eviction on behalf of the landlord. O.C.G.A. § 44-7-50(a). *Lasonde v. A&E Real Estate Sales & Management, Inc.*, 231 Ga.App. 754, 500 S.E.2d 636 (1998) does not hold otherwise, only stating that an owner may be properly substituted for an agent in a dispossessory action. *Id.* at 754, 500 S.E.2d 638. After a hearing at which Respondent A&E was represented by Respondent attorney William West, the Magistrate ruled against Petitioners. R.13-16, V2. An allegedly "forged" check was introduced into evidence at the hearing. Someone had stricken through "May" and substituted "April" on the check indicating the month to which the rent check was to apply. Petitioners appealed to the Superior Court and asserted a counterclaim against Respondents for "forgery," "theft by taking," and for violation of the Georgia RICO Act, O.C.G.A. § 16-14-6.

R.19-21, V2. During the pendency of the Superior Court appeal, Petitioners surrendered the premises and moved to Florida. The Superior Court appeal was dismissed for failure to join the owner. R.26-28, V2.

Petitioners thereafter unsuccessfully reasserted their *pro se* state law tort action for "forgery," "theft by taking," and violation of the Georgia RICO Act against the Respondents seeking a myriad of remedies including treble damages, punitive damages, revocation of A&E's corporate charter and Myers' real estate broker's license, disbarment of West, and injunctive relief. Petitioners' claims were based upon the alleged predicate criminal acts of perjury for the filing of a form dispossessory affidavit which listed Respondent A&E as owner of the property rather than agent for the owner, forgery based upon the introduction of a check into evidence upon which someone other than the Respondents wrote the month for which the rent check was to apply, and theft by taking for stealing possession of the rental property from them.

The Superior Court ruled that Petitioners' claim arose from acts occurring during litigation and therefore Petitioners were required to pursue the exclusive remedy of an abusive litigation claim against Respondents under O.C.G.A. § 51-7-85. The Superior Court ruled an abusive litigation claim was procedurally barred by Petitioners' failure to provide the safe harbor notice letter required by O.C.G.A. § 51-7-84. The required notice letter affords the allegedly offending abusive litigator an opportunity to discontinue the offensive conduct without liability. The Superior Court also ruled the Petitioners' claims

were frivolous and awarded attorney's fees to Respondents under O.C.G.A. § 9-15-14.

Thereafter, Petitioners, who had long since moved to Florida, filed an Application for Temporary Restraining Order and Motion for Interlocutory Injunction against A&E. Petitioners sought to enjoin A&E from filing allegedly fraudulent dispossessory affidavits in actions against tenants other than Petitioners. The Superior Court ruled that the Petitioners, who lived out of state and presented no evidence or allegations that they were the subject of current or future dispossessory actions in Clayton County, Georgia, lacked standing to pursue injunctive relief. The Superior Court denied Petitioners' application and motion for injunctive relief. R. 218.

Petitioners did not argue in the Superior Court that the abusive litigation, attorney's fees, and injunctive relief statutes violated the Due Process or Equal Protection Clauses of the Fourteenth Amendment. In fact, Petitioners did not raise a constitutional challenge, or a federal question of any kind in the Superior Court, nor did the Superior Court decide any constitutional or federal question. The Georgia Court of Appeals affirmed. Again Petitioners did not raise any meaningful constitutional challenge or federal question in the Georgia Court of Appeals, nor did the Georgia Court of Appeals rule on any constitutional challenge or federal question. The Georgia Supreme Court denied Petitioners' petition for certiorari without opinion.

PART TWO
REASONS FOR DENYING THE PETITION

1. The Supreme Court Lacks Jurisdiction to Grant the Writ of Certiorari Because The Georgia Court of Appeals Did Not Decide Any Federal Question, Let Alone An Important Federal Question.

Petitioners have the burden of showing that the federal issue they raise was properly presented to the Georgia Supreme Court, the highest state court. When the highest state court is silent on a federal question, the Supreme Court assumes that the issue was not properly presented. The aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had a fair opportunity to address the federal question. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L.Ed.2d 203 (1997).

Petitioners' vague and generalized arguments, and citations to "due process" in the Georgia appellate courts are not sufficient to properly raise and preserve a constitutional challenge. *Howell v. Mississippi*, 543 U.S. 440, 443, 125 S. Ct. 856, 858, 160 L.Ed.2d 873 (2005); *Thomas v. Iowa*, 209 U.S. 258, 263, 28 S. Ct. 487, 488, 52 L.Ed. 782 (1908). Petitioners never raised any enumeration of error, or made any argument whatsoever, in the state courts relating to substantive due process, access to courts, equal protection, economic status, or discriminatory application of the state statutes involved.

Indeed, if the Georgia Court of Appeals had believed that the Petitioners had called into question

the constitutionality of the abusive litigation, attorney's fees, and injunctive relief statutes, it would have transferred the appeal to the Georgia Supreme Court. *See e.g., Bell v. Austin*, 278 Ga. 844, 607 S.E.2d 569 (2005). The Georgia Supreme Court has exclusive appellate jurisdiction of "... all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question." Ga. Const. Art. VI, §§ VI, Para. II.

Petitioners have failed to show that the Georgia Court of Appeals or Georgia Supreme Court decided an important federal question in a manner which conflicts with another state court of last resort or a United States Court of Appeals, or that the Georgia appellate courts decided an important federal question that has not been, but should be, settled by the Supreme Court. Accordingly, the Supreme Court lacks jurisdiction to review this case by writ of certiorari. The petition for writ of certiorari should be denied for want of jurisdiction.

2. The Preclusion of Petitioners' State Law Tort Claims Is Not Subject to Substantive Due Process Protection.

Petitioners complain of the dismissal of their "forgery," "theft by taking," and Georgia RICO claims based upon the preclusive effect of the exclusive remedy provision of Georgia's abusive litigation claim contained in O.C.G.A. § 51-7-85. Petitioners argue that they have a property interest in these state tort claims, the dismissal of which constituted a substantive due process violation.

The substantive component of the Due Process Clause provides protection from government interference with fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L.Ed.2d 772 (1997). Where substantive rights are created only by state law, such as tort claims, they are not subject to substantive due process protection. Substantive due process rights are created only by the Constitution. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring); *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110, 115 S. Ct. 898, 130 L.Ed.2d 783 (1995). The preclusion of Petitioners' state tort claims, which are precluded by a statutorily created state tort claim, simply does not amount to government interference with a fundamental right. Accordingly, the petition for writ of certiorari should be denied.

3. The Preclusive Effect of Georgia's Abusive Litigation Procedure Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioners argue that the preclusion of Petitioners' state tort claims, which is precluded by a statutorily created state abusive litigation claim, constitutes a substantive due process violation and denies Petitioners access to courts. However, the preclusion of Petitioners' state law tort claims of "forgery," "theft by taking," and Georgia RICO does not implicate a fundamental constitutionally protected interest. *U.S. v. Kras*, 409 U.S. 434, 445, 93 S. Ct. 631, 638, 34 L.Ed. 2d 626 (1973). The Petitioners had the right to avail themselves of the abusive litigation procedure if they so desired.

Further, the Due Process Clause of the Fourteenth Amendment does not entitle every civil litigant to a hearing on the merits in every case. Georgia's requirement of the safe harbor notice letter to trigger the right to raise an abusive litigation claim is a reasonable procedural requirement. Georgia may terminate an abusive litigation claim for failure to comply with this reasonable procedural rule without offending the right to access to courts afforded by due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S. Ct. 1148, 1158, 71 L.Ed.2d 265 (1982); *Boddie v. Connecticut*, 401 U.S. 371, 378-379, 91 S. Ct. 780, 28 L.Ed. 2d 113 (1971).

The preclusive effect of the abusive litigation procedure does not constitute a substantive due process violation. Where, as here, a statute does not infringe upon a fundamental right, due process analysis is performed under the "rational basis test." Under this test, a statute will be upheld in the face of a due process attack so long as it is rationally related to legitimate government interests. *Washington v. Glucksberg*, 521 U.S. 702, 728 S. Ct. 2258, 2271, 138 L.Ed.2d 772 (1997). The preclusive effect of the abusive litigation procedure is rationally related to Georgia's interests in discouraging frivolous litigation and is the final termination of litigation. Otherwise, a disappointed civil litigant, such as Petitioners in the instant case, could pursue an abusive litigation or similar action following the termination of the underlying litigation in any case. The disappointed litigants could claim, as the Petitioners did in the instant case, that the other party perjured itself or committed other abusive acts during the underlying litigation and start the litigation anew. Certainly,

Georgia has a legitimate government interest in preventing never-ending civil litigation.

Georgia also has a legitimate government interest in discouraging frivolous litigation as conceded by Petitioners. (Petition p.13). Petitioners' claims in this action are the type of frivolous claims which should be discouraged. To reiterate, Petitioners' claims are based upon alleged perjury by using a form dispossessory affidavit which stated the plaintiff was the owner rather than an agent, and the introduction into evidence of a check on which Petitioners claim someone had changed the month for which it was to apply. Petitioners have never shown how they were damaged by the alleged "perjury" or "forgery."

In fact, Petitioners failed to pay their rent as it came due, and then voluntarily vacated the premises during the pendency of their Superior Court appeal. The instant petition for certiorari is nothing more than a continuation of Petitioners' patently frivolous claims, which Georgia certainly has an interest in curbing. The petition for writ of certiorari should be denied because the preclusive effect of Georgia's abusive litigation procedure does not violate Petitioners' right of access to the courts, or otherwise constitute a substantive due process violation.

4. The Preclusive Effect of Georgia's Abusive Litigation Procedure Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

Petitioners next argue that the preclusive effect of Georgia's abusive litigation procedure violates the Equal Protection Clause of the Fourteenth Amendment. Petitioners claim that creating a class of persons who are precluded by the abusive litigation statutes from pursuing an otherwise justiciable state tort claim that rose during litigation is a violation of the Equal Protection Clause.

Because the complained of classification does not involve a suspect class or a fundamental right, the classification is subject to rational-basis review. Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67, 121 S. Ct. 955, 963-964, 148 L.Ed.2d 866 (2000); *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). The burden is upon the challenging party to negate any reasonably conceivable state of facts that could provide a rational basis for the classification. *Board of Trustees v. Garrett*, 531 U.S. 356, 367, 121 S. Ct. 955, 964, 148 L.Ed.2d 866 (2000). Petitioners cannot carry this burden. The classification they complain of, those persons who are unable to pursue state tort claims

because the claims arose during litigation, is rationally related to Georgia's interest in discouraging frivolous litigation and is the final termination of civil litigation as shown above. The petition for writ of certiorari should be denied because the preclusive effect of Georgia's abusive litigation procedure does not constitute an equal protection violation.

5. Petitioners Lack Standing to Assert an Equal Protection Challenge to Georgia's Attorney's Fees Statute Based Upon "Economic Status."

Petitioners also assert an equal protection challenge to the Georgia attorney's fees statute, O.C.G.A. § 9-15-14. Petitioners' argue that the statute discriminates based upon "economic status." However, Petitioners lack standing to pursue this challenge. There is nothing in the record, and Petitioners have never alleged, that they are financially unable to pay the awarded attorney's fees. They have not set forth any evidence or argument of an injury they have suffered as a result of discrimination based upon "economic status." Therefore Petitioners are not adversely affected by the Georgia attorney's fees statute because of their "economic status," and they lack standing to assert this challenge. *Lewis v. Casey*, 518 U.S. 343, 357-358, 116 S. Ct. 2174, 2183, 135 L.Ed.2d 606 (1996). The petition for writ of certiorari should be denied for this additional reason.

6. The Denial of Petitioners' Motion for Injunctive Relief Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioners argue that they had a property

interest in their Georgia RICO cause of action, and that the denial of injunctive relief to protect that purported claim violated their substantive due process rights. Petitioners' argument is without merit. Government action violates one's substantive due process rights only where the action deprives an individual of those fundamental rights and liberty interests that are protected by the Fourteenth Amendment. *See e.g., City of Cuyahoga Falls Ohio v. Buckeye Cmty.,* 538 U.S. 188, 200, 123 S.Ct. 1389, 1397, 155 L.Ed2d 349 (Scalia, J., concurring); *Washington v. Glucksberg,* 521 U.S. 702, 719-721, 117 S.Ct. 2258, 2267-2268 138 L.Ed.2d 772 (1997). Substantive due process rights, however, are created by the Constitution. *See Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L.Ed.2d 523 (1985). As Respondents have shown in Section 2 *supra,* the preclusion of Petitioners' state tort claim is not a violation of a fundamental right and does not give rise to a substantive due process violation. Likewise, the denial of injunctive relief to "protect" Petitioners' state tort claim is not a substantive due process violation. Petitioners' injunctive efforts were directed toward A&E's alleged misconduct in initiating legal proceedings to evict tenants other than Petitioners. The trial court held and the Georgia Court of Appeals agreed that the Petitioners, who had moved out of state, had no standing to pursue injunctive relief. The rulings of the trial court and Georgia Court of Appeals do not trigger a substantive due process violation. Consequently, the petition for writ should be denied.

Further, the Petitioners failed to raise the denial of their motion for injunctive relief as a question presented for review, and therefore the Court should

not consider that portion of the petition. Pursuant to the Supreme Court Rules, "[o]nly questions set out in the petition, or fairly included therein, will be considered by the Court." *U.S. Sup. Ct. Rule 14, subd. 1(a).* The Petitioners did not identify the denial of their motion for injunctive relief as a question for the Court to review, nor is this issue fairly included in the questions presented. The petition should be denied.

CONCLUSION

As the Petitioners are proceeding pro se and without citation to legal authority, it is difficult to identify and respond to any purported federal issues. However, it is clear that Petitioners did not obtain a ruling from the Georgia trial or appellate courts on any due process, equal protection or other federal question. Therefore, the Supreme Court lacks jurisdiction to review this case by writ of certiorari.

Even if the federal questions had been preserved for review, the petition should nonetheless be denied. The procedural default or preclusion of state tort claims and the denial of injunctive relief are not subject to review under substantive due process. Moreover, Petitioners do not have standing to mount an equal protection challenge to the Georgia attorney's fees statute on the ground of "economic status."

Petitioners have not made a coherent argument for the issuance of a writ of certiorari, and their petition should be denied.

Respectfully submitted,

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